U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 August 2005

BALCA Case No.: 2004-INA-00297
ETA Case No.: P2001-NJ-02472222

In the Matter of:

WHAT'S IN THE ICE BOX, INC.,
Employer,

on behalf of

TANIA COSTA,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearances: Cassandre C. Lamarre, Esquire
Wall Street Associates
For the Employer and the Alien
in Case Nos. 2004-INA-297, 299, 300 and 301

BEFORE: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This alien labor certification matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.

STATEMENT OF THE CASE

The Employer, What's in the Ice Box, Inc. ("WIB"),[1] filed an application for permanent alien labor certification on February 1, 2001 on behalf of the Alien to fill the position of Cook. (AF 18-19).[2] Central Migration, Inc. was identified as the agent for both WIB and the Alien. On March 20, 2001 WIB requested the conversion of the labor certification application to Reduction of Recruitment ("RIR") processing. (AF 1). On December 14, 2001, the CO denied WIB's request for RIR because of "deficiencies" and stated that the application was going to be processed along with other non-RIR applications. The CO stated that the deficiencies would be identified later. (AF 32, 34). The Appeal File contains investigatory notes indicating that the CO was suspicious that WIB was actually a catering business rather than a restaurant, despite representations in the record that WIB had a dining room.

On September 30, 2002 the CO wrote a letter directly to WIB indicating that its application for labor certification on behalf of the Alien was being returned without processing because Central Migration was the subject of a criminal indictment or information.[3] As a result the CO inquired whether WIB wished to continue the processing of the application and whether WIB wished to continue with the same entity representing it in the labor certification application. (AF 54, 56). The CO informed WIB that it must provide the requested information within 45 days or the filing date would be cancelled.

On October 9, 2002 WIB wrote to the CO indicating that it wished to continue to pursue the labor certification on behalf of the Alien, that it wished to continue to be represented by Central Migration, and that it wished that copies of documents be sent to both it and Central

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[1] The application was originally filed under the name "What's in the Box Restaurant." (AF 18). In its rebuttal, however, the Employer disavowed that name, stating that it was not a restaurant and that its name is "What's in the Icebox." (AF 71).

[2] "AF" is an abbreviation for "Appeal File."

[3] We take administrative notice that while this matter was pending before the CO, Ms. Cuco pleaded guilty to visa fraud and falsification of ETA 750 forms in U.S. District Court for the District of New Jersey. We take administrative notice that Ms. Cuco is subject to a ten year suspension from practice before this Board based on her falsification of labor certifications before the CO. *In the Matter of Dulce Cuco, Central Migration, Inc.*, 2002-INA-217 (Aug. 1, 2003). We also take administrative notice that in the suspension proceedings before the Board, Ms. Cuco admitted to "soliciting a couple of employers to sign labor certification cases" for employees who did not work for those employers. *Id.*

Migration. (AF 57).

On May 2, 2003, the CO issued a Notice of Findings (NOF) indicating intent to deny the application. The CO stated that since WIB's agent was the subject of a criminal indictment, the CO had to determine the legitimacy of WIB's labor certification application. Consequently, WIB was required to provide copies of the business' federal tax returns for the last two years, and a complete staffing chart reflecting each employee's duties, salary and work schedule. WIB was also directed to state whether it had received any payment from the Alien or the representative in exchange for filing the labor certification application. The CO further noted that WIB had filed two additional labor certification applications for two other cooks. The CO noted that WIB had asserted that it employs four cooks and four cook helpers for a restaurant that seats 250 people. However, a member of the CO's staff visited WIB's premises and found that there was no restaurant menu, that the location had a few small tables and seats for approximately sixteen people, and that WIB is mostly a catering business offering gourmet baskets, specialty deli foods and floral arrangements. Therefore, WIB was directed to document how it could guarantee full time employment for four cooks. WIB was advised not to advertise for the position because advertising would not cure the deficiencies and because advertising was contingent upon WIB's successful response to all the deficiencies. (AF 63-65). This NOF was mailed to WIB. There is no indication that it was sent to Central Migration or any other agent or representative of the Employer or the Alien. The NOF states that "[i]f the rebuttal is not mailed by certified mail on or before June 6, 2003, the Notice of Findings automatically becomes the final decision of he Secretary denying labor certification." (AF 65).

The Appeal File at AF 67 contains a copy of the first page of the NOF with a typewritten request for extension of time to file a Rebuttal, signed by Dulce Cuco, and dated June 5, 2003. The accompanying envelope indicates that the submission came from Central Migration. (AF 66). A handwritten note on the NOF page from the CO indicates that the time for the Rebuttal was extended to June 18, 2003. (AF 67).

At AF 68 of the Appeal File, a second copy of the NOF is found with the word June crossed out and replaced with the word July for the time period for the extension. What appears

to be a post-it note is also found on this document, with a notation from the CO stating "I gave an extension until June 18, based on request for 1 1/2 wks. Someone changed the date on the letter to July." An additional handwritten note states "ext. granted before you told me not to when Dulce req." The writer of this additional note is not identified.

WIB's rebuttal was dated June 6, 2003 but stamped received by the Department of Labor on July 21, 2003. (AF 70 to 71). It was sent in a Federal Express package postmarked July 16, 2003. (AF 68). In its Rebuttal WIB asserted that it wanted to continue to pursue the labor certification application, and indicated that the signatory of the rebuttal was the owner and the sole individual authorized to sign the application. Additionally, it provided its tax identification and proffered that it was not a restaurant, had never been a restaurant, and had never claimed to be a restaurant. WIB added a description of how extensive its catering business was, which included servicing senior citizens homes and schools. WIB added that it was working on additional contracts with some schools.

In a cover letter dated July 16, 2003, attorney Cassandre C. Lamarre inquired about the status of the application. This letter states that Ms. Lamarre represents WIB and the Alien. Attached to the letter is a G-28, signed by WIB's owner and the Alien on July 16, 2003. (AF 74).[4]

Ms. Lamarre made a second inquiry about the status of the application on September 11, 2003, noting that her clients had been granted an extension until July 18, 2003, that all necessary documents had been mailed, and that they were awaiting an answer from the CO. (AF 76).

The Appeal File contains a copy of Ms. Lamarre's September 11, 2003 letter, to which is affixed a handwritten note from the CO, dated September 17, 2003. The CO states that the original due date for the rebuttal was June 9, 2003 (allowing for the Memorial Day holiday), that

[4] We take administrative notice that Central Migration, Inc.'s address was 59 Wall Street, Suite 1, Newark, New Jersey. Wall Street Associates' address is 59 Wall Street, Suite 2, Newark, New Jersey. The record, however, does not establish what relationship, if any, Central Migration and Wall Street Associates, and Ms. Cuco and Ms. Lamarre may have had -- specifically whether they were business associates or merely coincidentally located in nearby suites.

an extension was only granted until June 18, and that the change to July was done by someone in Ms. Lamarre's office. The CO further writes that even if a 35 day extension had been granted from the original due date of the rebuttal, 35 days from June 9, 2003 would have been July 15, 2003 (allowing for the Fourth of July holiday). The CO observed that the NOF made it clear that the rebuttal must be mailed on or before the due date. The CO therefore concluded that since the rebuttal was not placed in the Federal Express system until July 16, 2003, the rebuttal was not timely and consequently the NOF automatically became the denial of the application. (AF 7).

WIB, through Ms. Lamarre, requested reconsideration of the CO's finding that the rebuttal was untimely filed. Ms. Lamarre stated that because the extension had been received the same day that the extended rebuttal was due, her office called and spoke to someone who agreed that there must have been a mistake and that the extension should probably have been to July 19, 2003 and not June 19, 2003. (AF 85). Ms. Lamarre requested that if the CO felt that the matter was now out of her hands, that the CO send her findings to the "Review Judge."

The CO's response to the request for reconsideration is found also at AF 85, where, in a handwritten note dated November 25, 2003, the CO states that the request for extension was signed by an individual who was not authorized. The CO noted that the person who signed the request for an extension was Dulce Cuco, who was convicted in Criminal Court for visa fraud. Therefore, the CO concluded that the request for extension was invalid, the Rebuttal was untimely filed and the NOF automatically became a denial. The CO advised WIB that if it wished to appeal it should do so by indicating it to the Administrative Law Judges.

In letters dated December 2, and December 4, 2003, WIB through Ms. Lamarre requested review by an ALJ. (AF 87-90). In the December 4, 2003 letter, Ms. Lamarre stated that she had taken over a number of Central Migration's cases, and expressed dismay that the CO seemed to be punishing her clients for having been represented by Ms. Cuco. Ms. Lamarre indicated that it was her belief that Ms. Cuco had still been permitted to request extensions, and that if she had not, this had not been communicated to her clients. WIB again requested review by an ALJ in a January 12, 2004 letter. (AF 95).

The Board docketed the Appeal on June 8, 2004, and issued a Notice of Docketing on July 1, 2004. Neither the Employer nor the Alien filed a brief or statement of position on appeal.[5]

DISCUSSION

Section 656.25(c)(3) provides that the employer may within thirty-five calendar days from the date of the NOF submit documentary evidence to cure the defects found to exist; failure to do so converts the NOF into the Secretary's final decision denying certification. In her handwritten determinations on the timeliness of WIB's rebuttal, the CO gave three reasons for finding that the rebuttal was not timely.

First, she found that she had not authorized an extension until July 18, 2003. We find that it was clearly not the CO's personal intention to grant an extension until July 18. Nonetheless, the post-it note at AF 69 strongly indicates that Ms. Lamarre was telling the truth when she stated that her office contacted the CO's office and that someone there gave an oral assurance that the extension had been granted to July 18 rather than June 18. The CO's grant of the extension to June 18 is dated June 16, 2003, which also supports Ms. Lamarre's assertion that she only received the extension on the day it would have been due, which on its face seems unreasonable and therefore probably a mistake.[6] Under those circumstances we find that Ms. Lamarre reasonably acted on the belief that she had until July 18, 2003 to submit the Employer's rebuttal. We also note that Ms. Lamarre mailed the rebuttal on July 16, 2003, two days ahead of the time she thought it was due. Although the CO later disavowed the July extension, we find that the CO cannot so lightly dismiss the actions of her own staff. We find that, despite the CO's apparent intentions, her staff gave the Employer an extension of time to file its rebuttal, that the

[5] This case is one of a group of five docketed appeals involving very similar factual circumstances and legal issues. *What's In The Ice Box, Inc*., 2004-INA-297, *Kaname Japanese Restaurant*, 2004-INA-298, *Playball Restaurant*, 2004-INA-299, *Uni Tri General Contractors*, 2004-INA-300, *Nivek Painting Inc*., 2004-INA-301. We have not consolidated these matters for decision because the fact patterns are not identical. Nonetheless, we note that in reviewing these decisions we were aware of facts and circumstances of the other docketed appeals and have considered them as companion cases.

[6] Ms. Cuco had requested a 1 1/2 week extension on June 5. Thus, the June 18 date probably was not actually a mistake. Nonetheless, we give Ms. Lamarre the benefit of a doubt that under the circumstances it may have been reasonable to think it was a mistake.

Employer filed within that extended period, and that the CO has not provided an argument supporting a finding that she should be able to disavow that extension.

The second reason the CO provided for the finding that the rebuttal was not timely was that 35 days from date of original rebuttal would have been July 15, 2003 (allowing for the Fourth of July holiday). This reasoning seems to be based on the assumption that the CO gives extensions in 35 day periods of time, although this is only speculation as the record does not explain the CO's logic. Given our finding that someone in the CO's office gave an oral extension of time to the Employer to July 18, 2003 to file its rebuttal, the time period of 35 days from the original due date of the rebuttal is irrelevant. Furthermore, it is not supported by any evidence of notice to the Employer that such a time period would be used to calculate the timeliness of its rebuttal.

The final ground the CO proffered for her finding that the rebuttal was not timely was that the request for an extension was made by Dulce Cuco, who was not authorized to act on behalf of the Employer. Based on the Appeal File, it appears that WIB was never informed that filings from Ms. Cuco would not be entertained by the CO. In fact, the CO's staff clearly approved the extension until June 18, which had been filed by Ms. Cuco, meaning that the November 25, 2003 denial of reconsideration was based on an after-the-fact finding that Ms. Cuco was not authorized to file such a request. The CO may have been justified in rejecting an extension request for that reason, but if so, she needed to have communicated Ms. Cuco' s ineligibility to the Employer and to her own staff.

We can appreciate the CO's frustration with Ms. Cuco and Ms. Lamarre; however, we find based on the record presented that the rebuttal was, in fact, timely filed. Thus, it is not necessary to analyze whether there are equitable considerations that justify a tolling of the rebuttal period.

In the interest of administrative efficiency, rather than remand this case for the CO to consider the rebuttal, we affirm the denial of labor certification because the rebuttal clearly failed when considered on its merits. The Appeal File provides ample evidence supporting the CO's

suspicion that the WIB was not what it purported to be in the ETA750A and accompanying documentation -- specifically a restaurant with the capacity for 250 customers.

The Employer denies that it ever represented it was a restaurant, but at least two documents signed by the Employer's owner clearly state that it is (the ETA 750A at AF 18 and a document entitled "Items of Information" at AF 14). The Employer consistently referred to itself as a "restaurant" up until the time of rebuttal. The newspaper advertisements used to support the RIR request, for example, represented that it was a restaurant.

Moreover, the Employer's rebuttal did not provide a staffing chart, W-2s or 1099 MISC forms, as directed by the CO in the NOF. Rather, the Employer merely made generalized assertions about future operations, which clearly were not sufficient to document a need for additional cooks regardless of whether the application is considered as one for a restaurant or as a caterer.

We note that the style and poor grammar of early submissions is noticeably different holding the Employer out as a restaurant. The Rebuttal evidence is clear that the original application was falsely presented as for a restaurant cook, not a cook for a caterer. The Employer may have been a victim of an unscrupulous attorney, who misrepresented the job being offered. The Employer's unfortunate choice of an attorney, however, does not relieve it from the responsibility to present a bona fide job opportunity. We find that, as a matter of law, the application does not present a bona fide job opportunity.

In this case, the Employer's request for reduction in recruitment was denied, followed by the CO's inquiry into whether the application was bona fide. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Subsequent to *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required where the application is so fundamentally flawed that a remand would be pointless, such as a finding of the absence of a bona fide job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). That is the circumstance in this case. Accordingly, the CO's denial of labor certification will be

affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.